**MICHAEL WILLIAM BARRET**

**v.**

**PUBLIC PROSECUTOR**

HIGH COURT MALAYA, ALOR SETAR
SYED AGIL BARAKBAH J
[CRIMINAL APPEAL NO. 30 OF 1980]
22 OCTOBER 1981

***CRIMINAL PROCEDURE:*** *Cannabis - Found in bag next to appellant - Trafficking of - Whether custody/control sufficient to constitute possession - Whether element of consciousness, power of disposal and physical possession required to prove possession.*

***EVIDENCE:*** *Admission - Whether depends on type of offence - Customs officer - Function and duties - Whether statements made to, admissible - Sections 37(A)(1), 39(1)(a) Dangerous Drugs Ordinance 1952.*

This was an appeal against the decision of the President, Sessions Court, Kangar who convicted the appellant for trafficking on his own behalf, 1,384.60 grammes of cannabis under s. 39(1)(a) of the Dangerous Drugs Ordinance 1952. The appellant was sentenced to life imprisonment with effect from 22 December 1977 and ordered three strokes of the rattan under s. 39(B)(2).

On 22 December 1977 at about 4.30 p.m. a Customs Office (PW1) boarded a Bangkok express train bound for Butterworth at the railway station, Padang Besar to check the luggage of passengers. He saw the appellant seated at the second class coach with a bag by his side. He identified himself to the appellant and asked him whether he had any dutiable goods to declare and the latter replied that he had none. The appellant however was alleged to have admitted that the bag next to him was his and at the request of the PW1 he unzipped the said bag. PW1 searched the bag and recovered seven packages of cannabis concealed in the fold of some clothings. In response to PW1's enquiry the appellant was alleged to have admitted that the seven packages which contained marijuana belonged to him. PW1 seized the bag, clothings and the packages and arrested the appellant. He then handed the exhibits to the Superintendent of Customs (PW2) who retained all the exhibits and sent the seven packages to the chemist but returned the bag to the appellant. The chemist subsequently confirmed that the seven packages contained cannabis weighing 1,384.60 grammes.

Counsel for the appellant argued *inter alia* that the learned President had erred in admitting certain evidence relating to the admissions alleged to have been made by the appellant to (PW1) and for relying exclusively on the said evidence when convicting the appellant of the charge. Alternatively, counsel argued that the learned President had erred in law and in fact in accepting that evidence in the light of lack of corroboration, the appellant's denial of having made such admission, the apparent language barrier that existed between the appellant and PW1 and the questionable veracity of PW1.

Counsel also argued that the alleged admissions were not admissible in law or if otherwise admissible, only slight weight should be given. The alleged evidence, he argued comprised of two parts viz. (1) the appellant's admission to PW1 that the bag placed next to him was his, and (ii) subsequently after the discovery of the packages containing cannabis, that the packages were It is to be noted that both admissions were made before appellant's arrest by PW1.

The learned DPP submitted that admissions were admissible under s. 24 of the Evidence Act 1950 because they were made voluntary without any inducement, threat promise proceeding from any per in authority and the provisions ss. 25 and 26 of the same does not apply to customs office.

**Held:**

**[1]** Construing Dangerous Drugs Ordinance as whole it is clear that the provisions of s. 37A applies statements made to police officer of or above the rank of inspector and to senior customs officers, cases falling within the ambit the Act. Since PW1 was not senior customs officer the alleged admissions were rendered inadmissible as they were not statement made in accordance with s. 37A. The administration of the caution under proviso (b) does not arise because the statements were made prior to arrest.

**[2]** The learned President erred in admitting the statements which amount to admissions alleged to have been made by the appellant. Since the admissions were wrongly admitted, that evidence by themselves were insufficient to infer ownership and knowledge. Custody or control by itself falls short of possession which in law requires the elements of consciousness, power of disposal and physical possession. It does not and cannot amount to the act of trafficking unless and until the presumption under s. 37(d) and (da) were invoked.

**[3]** The learned President had made wrong inferences on the inadmissible evidence of the admissions which were prejudicial to the defence. The accepted principle is that when there are more than one inference, the inference that should be drawn is the one in favour of the defence.

**[4]** The learned President had failed to apply the correct test in considering the defence. The conviction was therefore against the weight of the evidence as a whole. A retrial will serve no purpose in the light of the above.

**[5]** The conviction quashed and sentence set aside.

*[Appeal allowed.]*

**Legislation referred to**:
Dangerous Drugs Ordinance 1952, ss. 37A, (b), 37(d), (da), 39(1)(a), 39(B)(2)
Evidence Act 1950, ss. 24, 25, 26

*For the appellant - James Ponniah*
*For the respondent - Abu Saman bin Haji Yusof DPP*

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Also found at [1982] CLJ 199